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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, *Petitioner*

EMPRESA HONDURENA DE VAPORES, S. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of national and international labor unions, which have approximately thirteen million members. Eight of these international unions, with a total membership of over two hundred thousand, are primarily engaged in seafaring activities or related shoreside trades. All told, some thirty Federation affiliates have about

eight hundred thousand members employed in positions directly or indirectly connected with the maritime field. These workers will all be affected, to a greater or lesser extent, by the decision of this Court on the jurisdiction of the National Labor Relations Board in the present case.

Whether the NLRB may exercise jurisdiction over ships flying a foreign flag is a question which may arise in countless different factual contexts. Petitioners in this and the companion case, *McLeod* v. *Empresa Hondurena de Vapores, S. A.*, No. 91, October Term, 1962, will naturally emphasize the facts and law of the particular situation presented here. In view of some of the broad contentions that have been interjected into this case in the courts below, the AFL-CIO desires to place before this Court certain material on the status of the American merchant marine and the attitude of Congress toward it, together with a general discussion of the development of the so-called "flag of convenience" fleet and the role it plays in the defense plans and foreign relations of the United States. Should this Court decide that it must reach the multitudinous policy issues it has been invited to consider, we feel our presentation will enable the Court to embark on the venture with a firmer grasp of the realities beneath the surface of the foreign-flag problem.

ARGUMENT

A large part of this brief may well be an essay in irrelevancy. First of all, we fully subscribe to the position of petitioner National Maritime Union that a federal district court has no jurisdiction to review the Board's direction of a representation election in the present instance.[1] Cf.

[1] We are also in accord with the respondents in *Incres Steamship Co.* v. *International Maritime Workers*, No. 33, October Term, 1962, that the New York State Court of Appeals correctly held the state

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41. This jurisdictional point, which should be dispositive of the case, will be fully covered by the petitioner and we will not further concern ourselves with it. Secondly, assuming this Court feels it must reach the question of the applicability of the National Labor Relations Act to American commerce carried on under a foreign flag, we think that question should be met squarely as a legal issue requiring interpretation of the federal labor statute's jurisdictional provisions and of any relevant commitments of this nation under international law. Here again petitioner union, and the NLRB in the companion case, will say all that needs to be said.

If congressional labor policy interferes with what certain executive departments of the Government have become convinced is sound as a matter of defense and foreign policy, that is something for them to take up with Congress, not with this Court. But because such factors have been tendered for judicial attention in the present litigation, we will devote a major portion of this *amicus* brief to their treatment. A full exploration of even these essentially extraneous considerations will, we submit, serve only to reinforce the soundness of the union position. Therefore, after the briefest summary of our view of the applicable law, we propose to show that the upholding of NLRB jurisdiction in situations like this is entirely consonant with a realistic appraisal of defense requirements and a proper regard for international order, as well as being consistent

courts to be ousted of jurisdiction over the peaceful organizational activities involved in that case, since the controversy was "arguably subject" to the jurisdiction of the NLRB. How the Board might decide the question is at this point immaterial; what must be preserved is the Board's authority to make the initial determination. Only in this way can the "danger of state interference with national policy • • • be averted." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245.

with the long-standing attitude of Congress toward the development of an effective American merchant marine.

I. The NLRB Has Jurisdiction Over Labor Proceedings Arising From Essentially American Shipping Operations, Regardless Of The Foreign Registry Of The Vessels Involved.

As *amicus* the AFl-CIO does not intend to reiterate the thorough arguments of the National Maritime Union and the NLRB in support of the legal proposition that under section 2(6) and (7) of the National Labor Relations Act the Board has jurisdiction over labor proceedings arising out of what are essentially American shipping operations, regardless of the foreign registry of the vessels involved. To set the remainder of our brief in proper perspective, however, we wish to summarize briefly our understanding of the meaning and effect of the Board's doctrine.

1. Whenever its jurisdiction is invoked in a case involving a vessel flying a foreign flag, the NLRB will undertake to weigh, on the basis of the particular facts of each individual case, "the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority." See *Lauritzen* v. *Larsen*, 345 U.S. 571, 582. No *per se* theory is followed. When examination of the relevant facts reveals such contacts as "substantial continuing American foreign commerce" and "American ownership" or "an essentially domestic enterprise," jurisdiction is asserted. *West India Fruit and Steamship Co.*, 130 NLRB 343, 355 (1961); *Eastern Shipping Corp.*, 132 NLRB 930, 933 (1961). When a ship is shown to be engaged essentially in the commerce of another nation, however, jurisdiction will be declined, even though the vessel is American-owned and American-controlled and touches at American ports. *Dalzell Towing Co.*, 137 NLRB No. 48, 50 LRRM 1164, 1962 CCH NLRB ¶11,232 (May 29, 1962). This pragmatic, case-by-case approach

seems to us the only feasible way to cope with so complex a problem. Endorsement of this approach would of course not preclude reviewing courts from correcting an error by the Board in any given case.

2. In asserting jurisdiction the NLRB is not violating a rule that American laws cannot be applied to foreign-flag vessels, because there is no such absolute rule. *Wildenhus' Case*, 120 U.S. 1; *Marine Cooks and Stewards* v. *Panama Steamship Co.*, 362 U.S. 365; *cf. Lauritzen* v. *Larsen*, 345 U.S. 571, 579-582. The NLRB is not violating international or maritime doctrine or United States treaties declaring that the flag shall determine the nationality of the vessel, because the Board has expressly recognized that the foreign-flag ship over which jurisdiction is exercised retains its foreign nationality, just as does a resident alien in a bargaining unit in a Detroit automobile plant. *West India Fruit and Steamship Co.*, 130 NLRB 343, 359 (1961). The Board is not discriminating among the flags of any particular nations or group of nations, because the very point of its thesis is that the flag, as such, becomes irrelevant for federal labor law purposes once it is determined that "the shipping involved is essentially that of this nation and not that of a foreign nation which the exigencies of international trade have brought in contact with the United States" (R. 11-12). See also *West India*, *supra*, 130 NLRB at 366-367.

3. No niggardly interpretation of the jurisdictional clauses of the National Labor Relations Act is supportable. In that Act Congress undertook "to regulate all conduct having such consequences that constitutionally it can regulate." *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647; *NLRB* v. *Fainblatt*, 306 U.S. 601, 607. Despite this

sweeping mandate, the Board has not applied the Act with blind literalness. It has carefully observed that "the term 'affecting commerce' must be here construed in conformity with court decisions delimiting the reach of domestic statutes with respect to their foreign impact." *West India, supra*, 130 NLRB at 391, n.20. But with this qualification given its due, we do not think that the regulatory power of Congress over an essentially American shipping operation in American commerce, as exercised through the federal labor law, can be defeated by the change of an ensign on a fantail.[2]

II. The Consistent Policy Of Congress Has Been To Encourage The Development Of A Native American Merchant Marine, And This Objective Is Not Being Achieved.

We are aware that this Court has chided litigants who have urged it to extend domestic law to a situation involving some foreign elements "as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own." *Lauritzen* v. *Larsen*, 345 U.S. 571, 593. We have no intention of addressing such an appeal to this Court. On the other hand this Court has

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[2] We know this Court has said that the National Labor Relations Act is concerned with "industrial strife between American employers and employees." *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138, 144. But the Board's exercise of jurisdiction in foreign-flag cases has invariably involved vessels at least ultimately under American ownership or direction. And we trust we needs fear no return to the requirement of a proximate employment relationship before workers are accorded the rights of employees under the Act. Compare *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, with *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177.

also admonished the Labor Board that it "has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern Steamship Co.* v. *NLRB*, 316 U.S. 31, 47. We are dealing with a statute which by its terms covers situations like that in the instant case; and there is no express word from Congress, that an exclusion was granted to foreign-flag vessels. It will doubtless be argued that an exclusion should be inferred because otherwise a heavy blow will be dealt to certain presently existing foreign-flag fleets, especially the so-called "flag of convenience" fleets of Panama, Liberia, and Honduras (the "Panlibhon" states).

We think the supposed danger to the "flag of convenience" fleets is greatly exaggerated. But if the effect of approving Labor Board jurisdiction in these cases should prove beneficial to American seamen and to domestic shipping, even at the expense of some foreign-flag operations, then we say: that result would not be the least out of line with consistent congressional policy in the maritime field. Let it be emphasized that we do not ask this Court to make a policy decision in favor of American-flag operations. We simply urge it to apply the Labor Relations Act as written, and with an eye on the important objectives which Congress has traditionally sought to achieve in the maritime industry.

Congressional policy in this area finds its most comprehensive expression in the preamble to the Merchant Marine Act of 1936, 49 Stat. 1985, §101, 46 U.S.C. §1101, which reads as follows:

"It is necessary for the national defense and develop-

ment of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a *substantial portion of the water-borne export and import foreign commerce of the United States* and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) *owned and operated under the United States flag* by citizens of the United States, insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, *constructed in the United States and manned with a trained and efficient citizen personnel.* It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine." (Emphasis added.)

Much history lies behind that formulation. An express purpose of the LaFollette Seamen's Act of 1915, 38 Stat. 1164, which *inter alia* gave to all seamen the right to leave their ship when in harbor, was to force foreign vessels to observe American wage standards "as a means of retaining their crews for the return voyage"; this was expected to "equalize the operating expenses of foreign and domestic vessels engaged in over-sea trade and tend to build up our merchant marine." H. R. Rep. No. 645, 62d Cong., 2d sess., pp. 7, 14 (1914). Similarly, Senator Jones explained that a provision in the Jones Act Amendments of 1920, 41 Stat. 1006, §31, 46 U.S.C. § 597, granting foreign seamen the right to collect part of their unpaid wages when landing in American ports, was intended to further the objectives of the 1915 Act so that, "instead of placing a great burden on our

seamen and shippers," the result would be to "bring the wages of the seamen of other countries up to a level with our own." 59 Cong. Rec. 7037 (1920).

These piecemeal, indirect sorties against the cost differentials between American and foreign shipping proved unavailing. The Merchant Marine Act of 1936 made a frontal assault on the problem by authorizing construction and operating subsidies for vessels to be built in American shipyards and used on essential routes in the foreign commerce of the United States. 49 Stat. 1995, §501 (a), as amended, 46 U.S.C. §1151(a); 49 Stat. 2001, §601 (a), as amended, 46 U.S.C. §1171(a). The final words of Representative Sirovich in closing debate on the bill in the House may fairly be said to sum up the views of the vast majority of the members of both houses who spoke on the issue: "We must have American ships built by Americans, manned by Americans, and flying the American flag." 80 Cong. Rec. 10576 (1936). See also *id.* at 9899-9900 (Sen. Guffey); *id.* at 9916 (Sen. Copeland); *id.* at 10569 (Rep. Bland); *id.* at 10570 (Rep. Culkin); *id.* at 10571 (Rep. Moran); *id.* at 10572 (Rep. Crawford); *id.* at 10573 (Rep. Ramspeck). The responsibility of what is now the Federal Maritime Board was outlined by Senator Guffey when he said: "The amendments create a new commission • • • under which will be placed all of the administrative functions of developing an adequate merchant marine, under the American flag, to carry its domestic commerce and at least one-half of its water-borne foreign commerce • • •." *Id.* at 9900.

Against these fervently expressed expectations of Con-

gress must be set the statistics which chart the decline of the American merchant marine since World War II:

Employment Of American Seamen And Active Seagoing American Merchant Ships Over 1,000 Tons [3]

Year	No. Seamen	Year	No. Ships
1945	158,860	1946	2,332
1951	84,300	1950	1,145
1955	57,507	1955	1,026
1958	51,515	1960	930
1960	49,281	1961	933
1961	48,461	1962	890

The drop of the United States from its immediate post-war position as the world's leading maritime power is reflected in the following figures, which show us ranking

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[3] U.S. Dept. Comm., *U.S. Statistical Abstract* 600-601 (1962); U.S. Dept. Comm., Mar. Ad. News Release Nos. 61-92 (Dec. 1, 1961), 62-47 (Aug. 1, 1962). Figures for 1962 are as of August 1, and include 27 Government-owned vessels, so that we have now only 863 privately owned ships in active service. There were 897 such ships in active service as of December 1, 1961. Thus the decline shows little signs of slackening.

In 1959 it was estimated that there were 40,527 American seamen seeking employment, including 25,897 registered at the employment centers for unlicensed personnel maintained by the National Maritime Union, Seafarers International Union, and Sailors Union of the Pacific. Note, "The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet: Regulation of Shipboard Labor Relations and Remedies Against Shoreside Picketing," 69 Yale L.J. 498, 502, n. 32 (1960). There is a close correlation between these figures and the estimated 25,000 to 40,000 seamen's positions from which foreigners have displaced Americans. *Business Week*, June 10, 1961, p. 78.

fourth in terms of gross tonnage after the fleets of the United Kingdom, Norway, and Liberia:

Merchants' Fleets of Leading Maritime and Panlibhon Nations as of June 30, 1961 [4]

Country	Gross Tonnage (000's)	Totai Ships
United Kingdom	19,455	2,383
Norway	11,328	1,347
Liberia	10,667	836
United States	9,569	989
Japan	6,663	1,074
Panama	3,882	487
Honduras	94	21

In the light of the congressional policies previously discussed, perhaps the most meaningful figures of all are those which recount the enfeebling of our capacity to handle our

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[4] Federal Maritime Board and Maritime Administration, *Annual Report*, app. E, pp. 58-59 (1961); *Britannica Book of the Year* 427 (1962). Figures for the United States exclude vessels on the Great Lakes and 1,821 ships in the Maritime Administration's reserve or "mothball" fleet. Other countries having almost as many ships as the United States in their regular merchant fleets include the U.S.S.R. (910) and West Germany (859). *Ibid.* For earlier years see U.S. Dept. Comm., Mar. Ad., *Handbook of Merchant Shipping Statistics Through 1958* 28 ff., 119 (1959).

own foreign commerce. The course of this process since World War II can be gauged by the following:

Percentage of United States Foreign Trade Carried on American-Flag Ships [5]

Type of Trade	Year	Percentage
Totals, All Services	1946	65
	1951	42.9
	1960	10.5
Dry Cargo Exports	1946	60.9
	1960	15.5
Tanker Exports	1946	39.9
	1960	18.6
Dry Cargo Imports	1946	56.3
	1960	13.0
Tanker Imports	1946	75.8
	1960	3.4

For such vital defense requirements as oil, steel and aluminum, we are dependent on foreign shipping to the extent of almost 97 percent for our imported petroleum,

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[5] U.S. Dept. Comm., Mar. Ad., *An Analysis of the Participation of U.S. and Foreign Flag Ships in the Oceanborne Foreign Trade of the United States 1937, 1938; 1951-60* 6-9, 13 (1962) [hereinafter cited *Oceanborne Foreign Trade*]; *Hearings on the President's 1961 Tax Recommendations before the House Committee on Ways and Means*, 87th Cong., 1st sess., p. 2748 (1961) [hereinafter cited *1961 Hearings*]. Figures for dry cargo exports and imports for 1960 have been obtained by combining the Maritime Administration's separate figures for dry cargo carried by liners plying scheduled routes and by vessels other than liners, such as tramps.

and to the extent of almost 100 percent for our imported iron ore (which supplies about one-third of our iron needs) and for our imported bauxite (which supplies substantially all of our aluminum).[6] All told, during calendar year 1960 American-flag ships of every kind carried only 16 percent of all United States water-borne exports and 7.5 percent of all water-borne imports.[7]

Paralleling the decline of the American merchant marine has been the rise of the so-called "Panlibhon" fleets. This Court has already noted that "in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries." *Lauritzen* v. *Larsen*, 345 U.S. 571, 587.[8] As of December 31, 1961, foreign affiliates of United States companies owned 441 ships of over 1,000 gross tons which were registered under foreign flags, including 131 Liberian, 93 Panamanian and 13 Honduran.[9] But this is only part of the story. According to the latest figures that the Commerce and Navy Departments have made available, at one time or another during 1960 there were 540 merchant ships which were regarded as being under "effective United States control," that is to say, which were registered in Panama, Liberia,

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[6] *1961 Hearings, supra* note 5, at 2748. See also U.S. Dept. Navy, *U.S. Life Lines* 6, 13, 18 (1959).

[7] *Oceanborne Foreign Trade, supra* note 5, at 6-7.

[8] See generally Harolds, "Some Legal Problems Arising out of Foreign Flag Operations," 28 Ford. L. Rev. 295 (1959); Note, "Flag-of-Convenience Fleet," *supra* note 3, 69 Yale L. J. 498; Note, "Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts," 60 Colum. L. Rev. 711 (1960); Shils, "The 'Flag of Necessity' Fleet and the American Economy," 13 Lab. L. J. 151 (1962).

[9] U. S. Dept. Comm., Mar. Ad., *Foreign Ships of 1,000 Gross Tons and Over Owned by United States Parent Companies*, Rep. No. MAR-560-22, pt. 1 (Dec. 31, 1961).

or Honduras and which the owners had more or less formally agreed to turn over to the United States in a national emergency.[10] The difference between the 237 Panlibhon ships owned by affiliates of American companies and the number considered to be under effective control is apparently accounted for by "vessels owned by foreign companies, the stock of which is owned by American individuals."[11]

In 1960 Panlibhon ships under effective United States control carried 23.3 percent of our total oceanborne foreign trade, over twice as much as the 10.5 percent carried on

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[10] *Oceanborne Foreign Trade*, *supra* note 5, at 4, n. 3. In 1959 there were 518 such ships. See Nat. Acad. Sciences, *The Role of the U.S. Merchant Marine in National Security* 34 (1959) [hereinafter cited *Project Walrus*]. The Government-sponsored "Project Walrus" report commented at that time:

> "Determinations regarding effective control are not founded on governmental treaties. Assurances that specific ships will revert to U.S. control are given by the U.S. owners of the ships, not by the country of registry. Former U.S. flag vessels that were transferred to PANLIBHON registry are under effective control as a result of stipulations in the transfer contract approvals granted by the Maritime Administration. Less formal agreements apply to foreign-built shipping. U.S. owners can register foreign-built shipping under any friendly flag of their choice, or transfer from one flag to another at will." *Id.* at 57. See also 46 C.F.R., pt. 221, app., p. 351 ff. (1958).

[11] Letter from Maritime Administrator, quoted in Note, "Flag-of-Convenience Fleet," *supra* note 3, 69 Yale L. J. at 499, n. 7. Altogether it is estimated that 40 to 50 percent of the Panlibhon fleet is controlled by United States interests, led by the great American petroleum companies, with Greek interests, sometimes backed by American capital, accounting for most of the remaining tonnage. 14 *Norwegian Shipping News* 1406 (1958); *Oceanborne Foreign Trade*, *supra* note 5, at 4 (11 or 12 million deadweight tons out of 24 million); Sørensen, *The Law of the Sea* 202 (International Conciliation No. 520, 1958); *Project Walrus*, *supra* note 10, at 55.

vessels flying our own flag.[12] And during that year the entire Panlib tanker fleet, which ranks as the world's largest and one of the most modern, handled 58 percent of our tanker trade, compared to a mere 5 percent handled by American-flag ships.[13]

In response to this documentation that American-flag vessels are not carrying that portion of our foreign commerce intended by Congress when the Merchant Marine Act of 1936 was passed, the Maritime Administration, the Defense Department, and others contend that strict compliance with the policy of the Act is impractical; that the existence of Panlibhon vessels under effective United States control provides the only feasible substitute and is essential to national defense; and that application of the federal labor law to this shipping would drive it to other registries where we could not maintain our effective control.[14] We reply that the briefest scrutiny of this whole notion of "effective United States control" will demonstrate that some of the highest ranking maritime and naval officials have not known exactly what they meant when they have spoken of effective control; that they have lacked definite plans for meeting a national emergency through the use of ships now supposedly under effective control; and that they have not shown that the application of the Labor Relations Act will significantly erode this shipping or any part of it.

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[12] *Oceanborne Foreign Trade*, *supra* note 5, at 4-5.

[13] *Id.* at 10-11; OEEC, *Maritime Transport 1960* 53 (May 2, 1961); *Merchant Shipping Statistics*, *supra* note 4, at 48-49.

[14] Such contentions were made before the NLRB in *West India Fruit and Steamship Co.*, 130 NLRB 343, 345, n. 4, 364-368 (1961), as well as in the instant and other cases (R. 9, n. 1). Unlike the traditional maritime powers, Panama and Honduras have imposed no significant restrictions, and Liberia only a few, on the control of merchant ships flying their flags. *Project Walrus*, *supra* note 10, at 58; Note, "Panlibhon Registration", *supra* note 8, 60 Colum. L. Rev. at 719-720.

Perhaps incidentally such an inquiry will also confirm the conclusion of one disinterested observer that "the relevant legislation looks toward the goal of an American-flag merchant marine, and the 1957 House hearings seem to indicate that the Maritime Administration has failed in the past to go to Congress with requests and recommendations to implement this congressional aim." [15] We turn now to a short study of the concept of "effective United States control."

III. The Concept Of "Effective Control" Is Ill-Considered, Deficient As An Element Of Defense Policy, And In Any Event Not Likely To Be Destroyed By The Application of Federal Labor Laws To American-Owned Panlibhon Shipping.

In 1957 the then Maritime Administrator appeared before the House Committee on Merchant Marine and Fisheries to discuss such problems as the transfer of vessels to foreign registries. The highly relevant issue of "effective control" was brought up, and the following colloquy took place: [16]

Q: "Can you outline for us the development of this concept of effective United States control * * *?"

A: "What factors we consider establish effective United States control? * * * Stock ownership is one. Majority of American shareholders and American directors is the second. The forfeiture proceedings in the event of a violation of our contractual commitments with the transferee, the penalty provisions in the contract, the fact that these countries are members of NATO so that the vessels are

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[15] Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 727.

[16] *Hearings on Vessel Transfer, Trade-In, and Reserve Fleet Policies before the House Committee on Merchant Marine and Fisheries*, 85th Cong., 1st sess., pt. 1, pp. 129-130 (1957) [hereinafter cited *1957 House Hearings*].

available in our defense requirements in the event of war involving the NATO countries."

Q: "Liberia and Panama are not NATO countries, are they?"

A: "No, but they are pretty well affected by the United States foreign policy and have been friendly countries and have made their ships available to us in past wars. These two countries have agreed to these conditions being attached."

Q: "Are there treaty arrangements?"

A: "It is not a treaty arrangement, I am sure, but at most it would be an informal letter of concurrence. It seems to me that the major reasons that there is effective United States control are two: One is the effectiveness of the United States Navy and secondly, the Ship Warrants Act, which is a stranglehold on all vessels whether American flag or foreign flag, if they ever want to have any services or bunkering, insurance or what have you, in a wartime situation."

Q: "Is the Ship Warrants Act in being?"

A: "I cannot recall whether it has terminated now or not . . . ." [Shortly hereafter in the record there was inserted by the Maritime Administration an unhappy little statement, which began: "We do not at present have ship-warrants legislation."]

In this remarkable passage the highest ranking civilian responsible for American maritime policy based his notion of "effective control" on (1) American stock ownership and contractual commitments (factors which were jettisoned completely when the recapitulation of hard-core reasons was reached); (2) NATO membership of the countries of registry (which doesn't exist); (3) some undefined "con-

currence" by the countries of registry (which hasn't prevented Liberia from placing limitations on the right to make vessels under its flag available for use by another country"); (4) the effectiveness of the United States Navy (a solid note, indeed, but one whose overtones may clash with the harmony usually sought in international relations); and (5) ship-warrants legislation (which no longer existed).

A somewhat similar path from reliance on American stockholders to reliance on the American Navy was traversed by the Assistant Chief of Naval Operations for Logistics in an appearance before the same committee. In his prepared statement he said:

> "Perhaps 'effective United States control' is not a fully descriptive term. A more realistic term might be 'effective United States management control' by which we mean that control which can be exercised by the United States Government through United States citizen directors and United States citizen majority stock ownership." [18]

Under questioning, however, the Admiral became even more realistic. The following exchange occurred: [19]

Q: "What I was getting at was if the ship were away from a United States port and the owner ordered it back to be delivered and the officers and men on the ship did not see fit to bring it back, have you any effective control except what the management has?"

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[17] Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 720, n. 78.

[18] *1957 House Hearings, supra* note 16, pt. 2, p. 553.

[19] *Id.* at 580. Doubt is cast on the Navy's ability to maintain control of these ships, even after acquiring it, by a subsequent exchange between the Admiral and committee counsel:

Q: "Would the Navy be in a position to convoy those ships?"

A: "No, we would not, without some preparation." *Ibid.*

A: "Only by seizure."

By 1959, when the Government-sponsored Project Walrus study was made, the importance attached to the element of raw power had emerged more clearly. After a preliminary nod to "these small, friendly countries," the report went on frankly to say:

> "PANLIBHON countries possess negligible capability to intercept, seize, or protect shipping on the high seas. Consequently, these nations are not in a position to expropriate U.S. property afloat *or to dispute U.S. assumption of control over selected shipping.*" [20]

Thus, except insofar as the crews of Panlibhon ships under ultimate American ownership might be more amenable to proceeding to an American port in an emergency, it would be just about as logical to conclude that the shipping of any small, weak nation is, right today, under effective United States control. This obviously makes the responsiveness of the crews of these Panlibhon vessels to American orders a matter of critical concern.

Project Walrus conceded candidly: "An acknowledged weakness in the reliability of U.S.-owned 'flag-of-convenience' ships is the crewing of such ships primarily by foreigners." [21] Senator Magnuson opened Senate hearings in 1957 with the comment: "To put it mildly, I am exceedingly skeptical as to the promised availability of these transferred vessels." [22] He later pointed to the results of a check by the Maritime Administration on a cross-section of flag of convenience ships. There were only 144 United States

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[20] *Project Walrus, supra* note 10, at 58. (Emphasis added.)

[21] *Id.* at 31.

[22] *Hearings on Ship Transfers to Foreign Flag before Subcommittee on Merchant Marine and Fisheries of the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 1st sess., p. 3 (1957).

officers on 191 vessels. Out of a total of 1,145 licensed personnel, only 65 American citizens were serving in the key positions of master, chief engineer, and radio operator. And among more than 4,000 unlicensed personnel there were only 25 American citizens.[23]

American union spokesmen have been particularly emphatic about this problem. The Executive Secretary of the AFL-CIO Maritime Committee testified before Congress in 1957: "It is well-known that many foreign seamen and their unions are communistic or sympathetic to communism."[24] The Assistant Chief of Naval Operations for Logistics has admitted with regard to Panlibhon crews: "We have no means of screening the personnel."[25] After declaring that the Defense Department would prefer American registry of all ships needed for defense purposes and that the effective control concept "[a]dmittedly • • • has its faults," he nevertheless did no more than conclude with the bland reassurance that we had a "reasonable prospect" of securing Panlibhon ships in an emergency.[26] Neither he nor any other official of the Defense Department or the Maritime Administration affirmatively requested Congress to make possible the concededly superior solution of adequate shipping under the American flag.

Assuming the United States can acquire control of these Panlibhon vessels in an emergency, however, the question remains how they are to be manned once they are back under our flag. The lack of real thinking about even the most obvious elements and implications of this supposedly

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[23] *Id.* at 125.

[24] *1957 House Hearings, supra* note 16, pt. 2, p. 694. See also testimony of the Legislative Director of the AFL-CIO Maritime Trades Department, *1961 Hearings, supra* note 5, at 2749, 2751.

[25] *1957 House Hearings, supra* note 16, pt. 2, p. 570. See also *id.*, pt. 2, p. 606.

[26] *Id.*, pt. 2, pp. 552, 579-580, 602.

key defense concept of effective control is illustrated by another passage in the 1957 House hearings. The Assistant Chief of Naval Operations for Logistics was again being questioned:[27]

Q: "Do we have a mobilization plan which covers ships' officers and necessary skilled personnel, trained personnel?"

A: "No, sir; we do not for Maritime ships. May I ask Admiral Ford [Deputy Maritime Administrator] if he has one for Maritime? • • • [To Mr. Ford:] Do you have any plan for mobilizing American seamen for American ships?"

A [Mr. Ford]: "We have no definite plans."

If that is the concept of effective control, it constitutes a fragile underpinning indeed for national defense policy. But even granting *arguendo* that effective control possesses all the merits claimed for it, a second question is left: will the application of the Labor Relations Act in cases like the present one be seriously detrimental to the doctrine? We think not, for several reasons.

The Department of Defense has argued that if Panlibhon registry loses its advantages, foreign-built ships now under "effective control" will probably move to the registries of traditional European maritime powers, whose laws, unlike those of the Panlibhon nations, provide for the requisition of their ships in an emergency.[28] Thus our effective control would supposedly be lost.

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[27] *Id.*, pt. 2, p. 607. See also Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 721-722.

[28] See *West India Fruit and Steamship Co.*, 130 NLRB 343, 365-366 (1961). Panlibhon vessels originally under American registry can be further transferred only with the approval of the Maritime Administration, but this obsolescent war-built shipping is decreasingly important by comparison with the larger portion of the American-owned flag of convenience fleet, which was built and initially registered abroad. *Ibid.*; Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 720. See also note 10 *supra*.

This argument overlooks some simple facts. First, the major appeal of Panlibhon registry is not labor savings at all; it is tax savings.[29] Liberia, for example, imposes no tax whatsoever on the income of her flag vessels unless they are engaged exclusively in the Liberian coastal trade.[30] An American union spokeman has presented figures to Congress showing that in a typical tanker voyage from Iran to New York, the increased cost resulting from the use of an American crew instead of the cheapest foreign crew would be only one-fifth as much as the estimated United States federal tax on the profits of the voyage.[31] The Organization for European Economic Cooperation has likewise found in the tax feature the primary reason for the move to flags of convenience.[32] So regardless of the application of American labor laws and whatever effect they might have on wage structures, the basic attraction of Panlibhon registry would remain.

Secondly, the suggestion that shipowners would seek to escape NLRB jurisdiction by shifting from Panlibhon to European registry totally misconceives the Board's rationale for asserting jurisdiction. The Board has repeatedly declared that its jurisdiction depends on the nature of the commerce involved, not the particular flag, and that other conditions being equal, it would act the same way toward

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[29] See generally Note, "Flag-of-Convenience Fleet," *supra* note 3, 69 Yale L. J. at 500, nn. 18 and 19 and accompanying text; Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 715; Sørensen, *The Law of the Sea* 202-203 (International Conciliation No. 520, 1958).

[30] Liberian Code, tit. 35, §140(c) (1956).

[31] Testimony of Legislative Director, AFL-CIO Maritime Trades Department, *1961 Hearings*, *supra* note 5, at 2753.

[32] McDougal, Burke and Vlasic, "The Maintenance of Public Order at Sea and the Nationality of Ships," 54 Am. J. Int. L. 25, 32-33 (1960).

European-flag shipping as toward Panlibhon-flag shipping. See *West India Fruit and Steamship Co.*, 130 NLRB 343, 366-367 (1961); instant case (R. 11-12). Thus there would be nothing to gain in a transfer to a European flag.

Finally, even if there should be a move to the traditional maritime registries of Europe, it is hard to view this as a real disaster. Nearly all these powers are NATO members. And although the Federal Maritime Administrator apparently was ready, erroneously, to use NATO membership as a basis for justifying the effective control concept in the case of the Panlibhon nations,[33] surely his underlying premise was sound. Most foreseeable major emergencies involving this country would inevitably involve the NATO countries, and their shipping would be as much available to us and the common effort as shipping flying any flag except our own.

We are left with no satisfactory explanation for the willingness of the Defense Department and the Maritime Administration to champion, as a matter of national defense policy, the immunity of Panlibhon-flag vessels from NLRB jurisdiction. Perhaps, as some of the preceding discussion indicates, it is merely the result of fuzzy thinking. Perhaps it is an instance where an uncritical and unconscious parallelism has come to characterize the thinking of closely allied military and industrial establishments.[34]

In any event, we do not see why the decision in these cases should turn, so far as defense policy is concerned, on whether there is solid reality behind the concept of "effec-

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[33] See text accompanying note 16 *supra*.

[34] *Cf.* the parting warning by President Eisenhower against an increasing concentration of power and decision-making in a giant military-industrial complex. *N.Y. Times*, Jan. 18, 1961, p. 1, col. 8, p. 22, col. 4.

tive control" or not. If there is, and the United States properly regards certain Panlibhon ships as occupying a genuine place in our defense scheme despite their foreign registry, we still find no more reason for exempting them, when engaged in American commerce, from the application of the Labor Relations Act than for exempting any other "enterprise affecting national defense and subject to foreign competition of countries with lower business taxes than, and terms of employment inferior to, those prevailing in this country." *West India Fruit and Steamship Co.*, 130 NLRB 343, 370 (1961). If there is no solid reality behind the concept, then of course there is no valid defense purpose which could be served by exempting Panlibhon vessels from the coverage of the Act. At the very most we find here a policy issue in the realm of defense economics, which should be decided by Congress and not by this Court.

IV. NLRB Jurisdiction Over Foreign-Flag Shipping Engaged In American Commerce Does Not Violate International Law; At Most It May Interfere With An American Foreign Policy Aimed At Upholding The Ill-Considered Concept Of "Effective Control."

We would be sympathetic toward the position of the State Department in the present litigation, if the NLRB in asserting jurisdiction were violating well-established principles of international law and comity, or if the State Department's position were based on a deep solicitude for the rights of the world's maritime powers. But neither condition applies. We will not duplicate the legal arguments of the NLRB and petitioner National Maritime Union that the Board's exercise of jurisdiction in these cases does not infringe the rights of the flag countries under

either general international law or specific treaties. For the most part we will confine ourselves to showing that the attitude of the State Department toward flags of convenience appears to bear more the earmarks of international politics than of international jurisprudence, and that the Department's ostensibly legalistic approach seems to have been dictated by the desire to preserve the highly dubious concept of "effective control."

In 1958 the United Nations Conference on the Law of the Sea was held at Geneva. Prior to the conference the Organization for European Economic Cooperation had studied the flag of convenience problem, and its eighteen member nations unanimously adopted a report stressing the importance of requiring a "genuine link" between a ship and its flag.[36] This was in keeping with a substantial

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[35] Art. X of the United States-Honduran Treaty of Friendship, Commerce and Consular Rights, dated Dec. 7, 1927, 45 Stat. 2618, 2625-2626, TS No. 764, requires each nation to recognize ships flying the other's flag as the latter's nationals. Art. XXII of the Treaty, *id.* at 2634-2635, grants consular officers of the flag nation "exclusive jurisdiction" over matters arising out of the "internal order" of the flag nation's ships and concurrent "jurisdiction" over wages and wage contracts. Parallel provisions are found respectively in art. XV of the United States-Liberian Treaty of Friendship, Commerce, and Navigation, dated Aug. 8, 1938, 54 Stat. 1739, 1745, TS No. 956, and in art. X of the United States-Liberian Consular Convention, dated Oct. 7, 1938, 54 Stat. 1751, 1756, TS No. 957. The United States has no such agreements with Panama.

The Labor Board has expressly recognized the foreign nationality of the ships involved in all these cases, but has quite correctly pointed out that the disputes in which it has intervened do not relate solely to the internal order of the vessels but have important consequences for the littoral state. *West India Fruit and Steamship Co.*, 130 NLRB 343, 357-359 (1961); instant case (R. 10, fn. 3).

[36] 14 *Norwegian Shipping News* 514 (1958). See also Harolds, *supra* note 8, 28 Ford L. Rev. at 297.

body of scholarly thinking to the effect that, whatever might be the clichés regarding the paramountcy of the flag, in actual practice other more meaningful links, such as "national ownership" in the sense of ownership by the state or its citizens, were preeminent.[37] The International Law Commission (ILC), charged with responsibility for preparing draft conventions for the Geneva Conference, followed through with this pertinent proposal:

> "Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship."[38]

The United States, joined as might be expected by such nations as Liberia and Panama, led the attack on the key

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[37] See Watts, "The Protection of Merchant Ships," 33 Brit. Yr. Bk. Int. L. [1957] 52, 84 (1958) ("[n]ational ownership as a basis for protection, however, would appear to be in accord with the law concerning protection in general, and is also supported in practice"). *Cf.* "Joint Final Report of the Commissioners," 29 Am. J. Int. L. 329, 330 (1935) (denying Canada recovery for the sinking by the United States of the *I'm Alone*, which, "although a British ship of Canadian registry, was *de facto* owned, controlled, and at the critical times managed" by American citizens); *The Nottebohm Case* (Second Phase), [1955] I. C. J. Rep. 4, 23 (the legal bond of nationality must accord "with the individual's genuine connection with the State"). See also Sørensen, *The Law of the Sea* 204-205 (International Conciliation No. 520, 1958); Jessup, "The United Nations Conference on the Law of the Sea," 59 Colum. L. Rev. 234, 256 (1959) ("[t]he 'link' theory • • • could easily be utilized internationally to determine the national character of corporations and ships").

[38] 4 *U.N. Conference on the Law of the Sea, Official Records* (A/CONF.13/40) 113 (1958) [hereinafter cited *Geneva Conference*].

last sentence of the ILC draft.[39] In committee, however, an attempt to excise the phrase "for purposes of recognition • • • by other States" was defeated by 39 votes to 13, with 6 abstentions.[40] Then, in the plenary session, the alignment changed, and by a vote of 30 to 15, with 17 abstentions, the final sentence in what is now article 5 of the Convention on the High Seas was watered down to read as follows: "There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[41]

Professor Max Sørensen, head of the Danish delegation to the conference, laconically attributes the shift in the vote of several delegations to "extensive lobbying."[42] There seems little mystery about the source of, or reason for, the lobbying. At an Intergovernmental Shipping Conference in 1959, Under Secretary of State Douglas Dillon declared that "*until such time* as it may prove feasible for these American shipowners to operate competitively under the United States flag, my government retains its interest in the continued operation of ships under foreign flags, including the PANLIBHON registries. From our view-point there are important and valid defense requirements which support this position."[43]

We of course do not suggest that the maneuvering behind the adoption of article 5 casts any doubt on its valid-

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[39] *Id.* at 22, 29, 64.

[40] *Id.* at 75.

[41] 2 *Geneva Conference* (A/CONF.13/38) 20 (1958); Convention on the High Seas, art. 5, *id.* at 136.

[42] Sørensen, *The Law of the Sea* 205 (International Conciliation No. 520, 1958).

[43] Quoted in Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 722. (Emphasis added.)

ity.[44] Indeed, the Labor Board has fully complied with the mandate of this provision, even as finally approved, by expressly recognizing the foreign nationality of flag of convenience vessels. But a proper evaluation of the State Department's stand on this whole problem requires, we feel, an understanding of the Department's motives and a realization that its policy toward Panlibhon shipping has on repeated occasions placed it at odds with a majority of the maritime powers of the world.

Illustrative of this last fact were the 1959 London sessions of the new United Nations Inter-Governmental Maritime Consultative Organization (IMCO). The inaugural meeting was "nearly disrupted" when a bitter dispute broke out over the right of Panama and Liberia to secure two of the seats reserved for the eight "largest ship-owning nations" on the Maritime Safety Committee, a permanent organ of IMCO.[46] The United States backed the claims of Panama and Liberia. However, other traditional maritime powers, contending that these two countries did not qualify on the basis of tonnage nationally owned by the state and its citizens, prevented their being seated on the Committee at the conference.[47] As one commentator has observed, the American positions at both the Geneva and London conferences were stated in purely legal terms, but "the very

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[44] The Convention has been ratified by the United States but is not yet effective for want of sufficient ratifications by other nations (R. 79-80).

[45] See note 35 *supra*.

[46] Jessup, *supra* note 37, 59 Colum. L. Rev. at 257.

[47] Note, "Panlibhon Registration," *supra* note 8, at 725-726. The controversy eventually had to be settled by the International Court of Justice, which ruled in 1960 that Panama and Liberia were entitled to membership on the Maritime Safety Committee on the basis of the Convention establishing IMCO. *Constitution of the Maritime Safety Committee*, [1960] I. C. J. Rep. 150.

line-up of nations on the issues presented suggests that political and economic factors were controlling."[6]

Plainly, therefore, the NLRB's exercise of jurisdiction over Panlibhon shipping that is American-owned or American-controlled and is engaged in American foreign commerce poses no threat to the majority sentiments of the international community, however much certain departments of our own Government may have convinced themselves that some prop of national defense has been placed in jeopardy. Furthermore, any misgivings by other countries that the Labor Board has embarked on a broadside assertion of jurisdiction over all foreign commerce touching our shores should have been sufficiently allayed by the Board's recent decision in *Dalzell Towing Co.*, 137 NLRB No. 48, 50 LRRM 1164, 1962 CCH NLRB ¶11,232 (May 29, 1962). The NLRB there made clear that shipping which is genuinely part of the commerce of another country will not be considered subject to the Labor Relations Act, even though the vessels involved are owned and controlled by Americans, and sporadically or regularly put in to American ports.

To compel the Labor Board to do more than this, to compel it to withhold its processes when a labor dispute arises out of what is truly American commerce, is not required by any established principle of international law or by any well-grounded national objective of the United States. And it would be a deep disservice to American seamen, to American labor standards, and to the consistent congressional policy of promoting a viable and effective American merchant marine.

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[6] Note, "Panlibhon Registration," *supra* note 8, 60 Colum. L. Rev. at 726.

CONCLUSION

We do not ask this Court to reverse the judgment below for the reasons which have occupied the major portion of this brief. We ask for reversal for the reasons submitted in full by the NLRB and petitioner National Maritime Union, *viz.*, that this is the result called for by section 2(6) and (7) of the National Labor Relations Act and that international law and our international commitments call for no other result. Insofar as this Court may feel it necessary to consider some of the wide-ranging policy contentions made in this litigation, however, our discussion demonstrates that there are no sound grounds in defense or foreign policy for varying the result prescribed by law.

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